

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1296

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

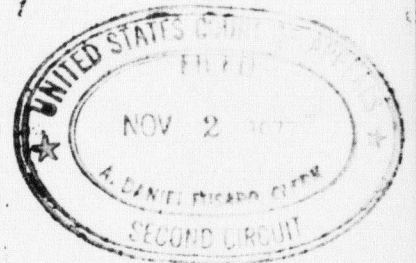
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-

JOHN McFARLAND and
ALPHONSE BIFULCO,
Michael Thistlewhite
Defendants-Appellants.

B
P/S
Docket No. 77-1296
Docket No. 77-1297

APPENDIX FOR APPELLANTS' BRIEFS

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY
Attorney for Appellant
JOHN McFARLAND
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,

Of Counsel.

THOMAS MCGANNEY, ESQ.,
Attorney for Appellant
ALPHONSE BIFULCO
14 Wall Street
New York, New York 10005
MILES PRENTICE,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

JUDGE/MAGISTRATE Assigned U.S. 0719

OR Mis L X 207 1

Disp /Sentence

Office

76 CR 822

MCFARLAND, JOHN a/k/a John Kane

(LAST, FIRST, MIDDLE)

Case File No. 12/30

Day

No. of Defs 5

JUVENILE

U.S. TITLE/SECTION 846

OFFENSES CHARGED - T-21:841(a)(1) & did conspire and combine to manufacture, possess and distribute quantities of phencyclidine

ORIGINAL COUNTS 1

FILED

DEC 31 1977

CAROL FUSARO, CLERK

SECOND CIRCUIT

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Custody Began	High Risk Date 12/30/76	1-5-77	Trial Set For 3/15/77
Summons Served	Indict. Waived	1st Plea 1-5-77	Trial Begun
First Appearance	In Charging District	Final Plea	Trial Ended 3/30/77

BAIL • RELEASE

AMT ☐ Fugitive

Set ☐ Pers. Recog.

PSA

conditions

10% Deposit

Surety Bond

Collateral

3rd Cust

Other

MAGISTRATE

DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	OUTCOME:
Search Warrant Issued		PRELIMINARY EXAMINATION OR REMOVAL HEARING	☐ DISMISSED ☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT ☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW:
Summons Issued		☐ WAIVED ☐ NOT WAIVED ☐ INTERVENING INDICTMENT	

ATTORNEYS

Defense ☐ CJA ☐ Ret. ☐ Waived ☐ Self ☐ None ☐ Other ☐ FD ☐ CD

DATE	(DOCUMENT NO.)	PROCEEDINGS
12/30/76		Before CATOGGIO, J.- Indictment filed. Bench warrant issued and issued.
1-5-77		Bench Warrant returned and filed. - Executed.
1-5-77		Before Costantino, J.- Case Called. Deft. present without Counsel. Deft. arraigned and the Court enters a plea of not guilty on his behalf. Bail set at \$50,000.00. Case adjd. to 1-7-77 at 10:00 A.M. for All purposes.
1-7-77		Before COSTANTINO, J. - Case called. Court appoints atty for deft. All motions by 2-10-77 & trial set for 2-28-77.
2.28.77		Before Costantino, J. - Case Called. Deft. & Counsel present. Trial adjd. to 3.7.77 as to the Defts.
		Motion for a reduction of Bail for Deft. Bail reduced to \$2,500.00 on condition Deft. live at home with parent and to phone Pre-Trial Services each day.
2.28.77		Financial Affidavit filed.

over.....

DATE	(DOCUMENT NO.)	IV. PROCEEDINGS (continued)	AGE TWO	V. EXCLUDABLE DELAY			
				Start Date and Date	Ltr Code (c)	Total Days (d)	
3.7.77		Before Costantino, J.- Case Called. Adj'd. to 3.8.77 for Trial.					
3-8-77		Before Costantino J - case called - deft & atty Guy Heinemann present - adjd to 3-9-77 for trial					
3.9.77		Before Costantino, J.- Case Called. Deft. & Counsel present. Motions to Suppress - Hearing held and begun. Hearing continued to 3.10.77.					
3/10/77		Before COSTANTINO, J.- Case called. Deft & Counsel present. Hearing continued. Hearing concluded. Decision reserved. Submit all papers by 3/14/77.					
3-14-77		Before Costantino J - case called - deft & atty present - suppression hearing begun - hearing concluded - decision on motion to suppress xxx denied as to this deft.					
3-14-77		Before Costantino J - case called - deft & atty present - trial ordered and BEGUN - Jurors selected and sworn - trial contd to 3-15-77					
3.21.77		Voucher for Compensation for Expert Services filed and forwarded to Washington for Payment.					
3/21/77		Voucher for compensation for expert services filed and forwarded to Washington for payment.					
3/18/77		Before COSTANTINO, J - Case called. Deft & Counsel present. Trial resumed. Trial continued to 3/21/77.					
3-21-77		Before COSTANTINO J - case called - deft & counsel present - trial resumed - motion for mistrial denied with leave to renew - trial contd to 3-22-77					
3.22.77		Before Costantino, J.- Case Called. Deft. & Counsel present. Trial continued to 3.23.77.					
3-23-77		Before Costantino J - case called - deft & atty present - trial resumed - trial contd to 3-24-77					
3-24-77		Before Costantino J - case called - deft & atty present - trial resumed - trial contd to 3-28-77.					
3-28-77		Voucher for expert services filed and forwarded for payment					
3/28/77		Defts request to charge jury filed.					
3/28/77		Govts request to charge filed.					
3/28/77		Before COSTANTINO, J.- Case called. Deft & Counsel present. Trial resumed. Trial continued to 3/29/77.					
3.29.77		Before Costantino, J.- Case Called. Trial resumed. Govt. rests. Deft's. motion to dismiss - denied. Deft. rests. Deft's. motion for Judgment of Acquittal - Denied. Govt. sums up. Deft. sums up. Govt. rebuttal. Trial held and continued to 3.30.77 at 10:00 A.M.					
3-30-77		Before Costantino J - case called - trial resumed - Jury returns with a verdict of guilty as charged - Jury discharged. all motions to be made on day of sentence.					

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
3-31-77	11 volumes of transcripts filed (pgs 1 to 1650)				
4-4-77	Voucher for compensation for expert services filed.				
	and transcript filed dated Mar. 30, 1977				
6.3.77	Before Costantino, J.- Case Called. Deft. & Counsel present. Deft. sentenced for a period of 4 years imprisonment and a special parole term of 10 years and to pay a fine of \$2,500.00. Court grants deft. to appeal without prepayment of fee.				
6.03.77	Judgment and Commitment filed. Certified Copies to Marshal and Probation.				GP
6-8-77	Judgment and commitment retd and filed. Deft del. to MCC. NY.				GP
6-13-77	Notice of appeal filed (no fee) docket entries and duplicate of notice of appeal mailed to the court of appeals.				
6-22-77	Voucher for expert services filed forwarded for payment.				
7.20.77	Order filed received from the Court of Appeals that the record be filed on or before 8.27.77, in default of which the appeal shall be dismissed forthwith.				
7.28.77	Certified Copy of Judgment and Commitment returned and filed from Marshal. Deft. delivered on 6.29.77 to F.C.I., Sandstone, Minn.				GP
8-8-77	Voucher for compensation forwarded to court of appeals for approval (Guy Heinemann, counsel for deft)				GP

A TRUE COPY
ATTEST
DATED 8/30 1977
LEWIS ORGEL
CLERK
BY [Signature]
DEPUTY CLERK

C

0719

Disp / Sentence

BIFULCO, ALPHONSE

(LAST, FIRST, MIDDLE)

76 CR 822

Case Filed
Mo. Day

12 30

No. of Defs

* 5

JUVENILE

76 822

Docket No.

3

U.S. MAG.
CASE NO.

BAIL • RELEASE

☐ Denied ☐ AMT ☐ Fugitive*
☐ Set ☐ Pers. Recog.
☐ PSA
\$ 000
Date ☐ 10% Deposit
☐ Surety Bond
☐ Bail Not Made ☐ Collateral
☐ Status Changed (See Docket) ☐ 3rd ☐ Other

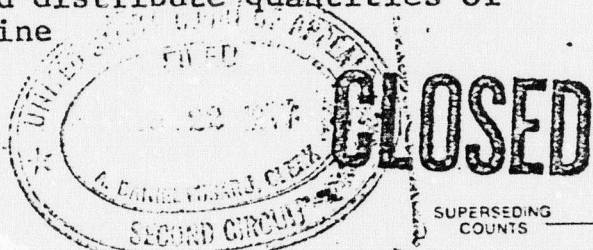
U.S. TITLE/SECTION

T-21:841 (a)(1) & 846 Did combine to manufacture possess and distribute quantities of phencyclidine

OFFENSES CHARGED

ORIGINAL COUNTS

1



SUPERSEDING COUNTS

II. KEY DATES & INTERVALS

ARREST or

INDICTMENT

ARRAIGNMENT

TRIAL

SENTENCE

U.S. Custody Began

High Risk Date

Information

12/30/76

1-7-77

2-28-77

Voir Dire

3/5/77

Disposition of Charges

3/3/77

6.03.77

Summons Served

Indict. Waived

☐

1st Plea

1/7/77

☒ NG ☐ G ☐ NOL

Trial Began

☒ N ☐ J

☒ Convicted

☐ Acquired

☐ Dismissed

☐ On All Charges

☐ On Lesser * Offense(s)

☐ WOP: ☐ WP

☐ On Government's Motion

First Appearance

In Charging District

Superseding

☐ Indict/Info ☐

Final Plea

☐ NG ☐ G ☐ NOL

Trial Ended

2/20/77

MAGISTRATE

Search

Issued

DATE

INITIAL/NO.

INITIAL APPEARANCE DATE

INITIAL/NO.

OUTCOME:

Warrant

Return

PRELIMINARY EXAMINATION

Date Scheduled

☐ DISMISSED

HELD FOR GO OR OTHER PROCEEDING IN THIS DISTRICT

Summons

Served

OR

Date Held

HELD FOR GO OR OTHER PROCEEDING IN DISTRICT BELOW

Arrest Warrant Issued

REMOVAL HEARING

☐ WAIVED ☐ NOT WAIVED

Tape Number

COMPLAINT

☐ INTERVENING INDICTMENT

OFFENSE

(In Complaint)

U.S. Attorney or Asst

ATTORNEYS

Defense ☐ CJ ☒ Ret ☐ Waived ☐ Self ☐ None / Other ☐ App ☐ CDP

APPLBEY

Louis Diamond

Show last names and suffix numbers of other defendants on same indictment/information

JOHN MCFARLAND 1; MICHAEL THISTLETHWAITE 2; MARIO BIFULCO 4; ROSEANN POLIMENI

DATE

(DOCUMENT NO.)

PROCEEDINGS

12/30/76 Before CATOGGIO, J. - Indictment filed. Bench warrant ordered and issued.
1-7-77 Before COSTANTINO, J. - Case called. Deft present without atty. Deft arraigned and the court enters a plea of not guilty on his behalf. Bail set at \$50,000 cash. The Court appoints atty for deft. All motions by 2-10-77 & trial set for 2-28-77 for trial.
1.25.77 Before Costantino, J.- Case Called. Deft. & Counsel present. Deft's. motion for a reduction of bail denied. Case set down for Hearing on 2.2.77 at 10:00 A.M.
2-2-77 Before Costantino J - case called - deft & atty present - Salvatore Quagliata is relieved as attorney for the deft. Case adjd to 2-28-77 for trial.
2/23/77 Copy of letter filed to Mr. Diamond from AUSA Weinbach, dtd 2/22/77, re: advising Mr. Diamond of materials which he is entitled to.
2/23/77 Notice of motion combined with notice seeking dismissal of indictment, etc. returnable 2/28/77 at 10:00 a.m. filed

DATE	DOCUMENT NO.	PROCEEDINGS (continued)	PAGE	V. EXCLUDABLE DELAY				LE For ad- able USC
				Interval Section II (a)	Start Date End Date (b)	Lu Code (c)	Total Days (d)	
2.28.77		Before Costantino, J.- Case Called. Motion granted and denied as indicated. Suppression motion adjd. to Time of Trial. (To Dismiss Indictment etc.)						A
2.28.77		Before Costantino, J.- Case Called, Deft. & Counsel present. Trial adjd. to 3.7.77.						
3.1.77		By U.S. Magistrate, Chrein, A.S.- Order for Acceptance of Cash Bail filed.						
3.7.77		Before Costantino, J.- Case Called. Adjd. to 3.8.77 for Trial.						
3-8-77		Before Costantino J - case called - deft & atty L. Diamond Salvatore Guagliata present -adjd to 3-9-77 for trial						
3.9.77		Before Costantino, J.- Case Called. Deft. & Counsel present. Motions to Suppress - hearing held and begun. Hearing continued to 3.10.77						
3/10/77		Before COSTANTINO, J.- Case called. Deft & Counsel present. Hearing continued. Hearing concluded. Decision reserved.						
3-14-77		Submit all papers by 3/14/77. Before Costantino J - case called - deft & atty present - motion to suppress is denied.						
3-14-77		Before COSTANTINO J - Case called - deft & atty present - Trial ordered and begun - Jurors selected and sworn - trial contd to 3-15-77.						
3.17.77		Before Costantino, J.- Case Called. Deft. & Counsel present. Trial resumed. Jury Sworn. Govt. opens. Deft. Opens. Trial continued to 3.18.77.						
3/21/77		Voucher for compensation for expert services filed and forwarded to Washington for payment.						
3/18/77		Before COSTANTINO, J - Case called. Deft & Counsel present. Trial resumed. Trial continued to 3/21/77.						
3-21-77		Before COSTANTINO J - case called - deft & counsel present - trial resumed - motion for mistrial denied with leave to renew - trial contd to 3-22-77						
3.22.77		Before Costantino, J.- Case Called. Deft. & Counsel present. Trial continued to 3.23.77.						
3-23-77		Before Costantino J - case called - deft & atty present - trial resumed - trial contd to 3-24-77						
3-24-77		Before Costantino J - case called - deft & atty present - trial resumed - trial contd to 3-28-77						
3-28-77		Voucher for expert services filed and forwarded for payment						
3/28/77		Govts request to charge filed.						
3/28/77		Before COSTANTINO, J. Case called. Deft & Counsel present. Trial resumed. Trial continued to 3/29/77.						

over.....

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

BIFULCO, ALPHONSE

76

822

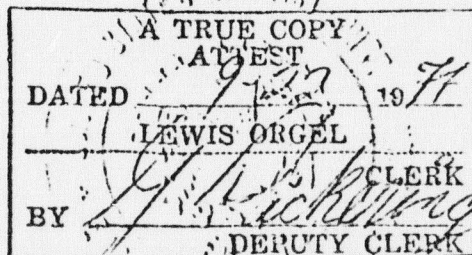
3

Yr.

Docket No.

Def.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
3.29.77	Before Costantino, J.- Case Called. Trial resumed. Govt. rests. Deft's. motion to dismiss - denied. Deft. rests. Deft's. motion for Judgment of Acquittal - Denied. Govt. sums up. Deft. sums up. Govt. rebuttal. Trial held and continued to 3.30.77 at 10:00 A.M.				
3-30-77	Before COSTANTINO J - case called - trial resumed - jury returns with a verdict of guilty as charged. Govt's motion to remand Alphonse Bifulco denied as indicated. Jury discharged. all motions to be made on sentencing date. Sentence adjd without date. Trial concluded.				
3-21-77	11 volumes of transcripts filed (pgs 1 to 1650)				
4-4-77	Voucher filed for expert services and transcript dated 3-30-77 filed				
6.3.77	Before Costantino, J.- Case Called. Deft. & Counsel present. Deft. sentenced for a period of 4 years and a special parole term of 5 years and a fine of \$1,000.00 Court grants deft. to appeal without prepayment of fee.				gp
6.3.77	Judgment and Commitment filed. Certified Copies to Marshal and probation.				gp
6-7-77	By Costantino J - Order releasing bail filed.				
6-8-77	Judgment & commitment retd and filed - deft. del. to Warden, MCC. NY.				
6.10.77	Notice of Appeal filed.				
6.10.77	Duplicate Copy of Notice of Appeal and Certified Copy of Docket entries mailed to the Court of Appeals.				gp
7.20.77	Order filed received from the Court of Appeals that the record be filed on or before 8.27.77, in default of which the appeal shall be dismissed forthwith.				gp
m8-25-77	Rule 35 motion filed forwarded to Chambers.				
9.12.77	Voucher for Compensation in excess of \$1,000.00 forwarded to the Court of Appeals for higher authorization (V# 452669) with Affidavit in Support.				gp
9.15.77	Order filed received from the Court of Appeals that the record be docketed filed on or before 9.23.77, in default of which the appeal shall be dismissed forthwith.				gp
9.22.77	Supplemental Record on Appeal certified and delivered to the Court of Appeals by Miles Prentice from White & Case.				gp



DAD:RA:mb
F#763,770

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76 CR 822

UNITED STATES OF AMERICA

I N D I C T M E N T

-against-

✓ JOHN MCFARLAND, a/k/a John Kane
✓ MICHAEL THISTLETHWAITE, a/k/a
✓ Mike Thistle,
✓ ALPHONSE BIFULCO,
✓ MARIO BIFULCO and
✓ ROSEANN POLIMENI,

Defendants.

Cr. No.
(T. 21, U.S.C., §841(a)(1)
and §846
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ DEC 30 1976 ★
TIME A.M. _____
P.M. _____

THE GRAND JURY CHARGES:

From in or about and between June 1975 up to the date of the filing of this indictment, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants JOHN MCFARLAND, also known as John Kane, MICHAEL THISTLETHWAITE, also known as Mike Thistle, ALPHONSE BIFULCO, MARIO BIFULCO and ROSEANN POLIMENI together with Larry DeMaio, Robert Borsillino, John Kowalchick, and Stephen Kopf, named herein as co-conspirators but not as defendants, together with others known and unknown to the Grand Jury, did knowingly and intentionally combine, conspire, confederate and agree to violate Section 841(a)(1) of Title 21, United States Code.

1. It was part of said conspiracy that the defendants and co-conspirators would knowingly and intentionally manufacture substantial quantities of phencyclidine, a Schedule III controlled substance.

2. It was further a part of said conspiracy that the defendants and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute substantial quantities of phencyclidine, a Schedule

(1)

III controlled substance.

3. It was further a part of said conspiracy that the defendants and co-conspirators would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities. (Title 21, United States Code, Section 846).

A TRUE BILL

Victoria Klepper
FOREMAN

David G. Trager
DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

6 (The jury enters the jury box.)

7 THE COURT: Good morning, ladies and gentlemen.

8 Now is the time for the Court to give you
9 the charge on the law. Now that you have heard the
10 evidence and the arguments it becomes my duty to
11 give you the instructions of the Court as to the
12 law applicable in this case.

13 It is your duty as jurors to follow the law
14 as stated in the instructions of the Court, and to
15 apply the rules of law so given to the facts as you
16 find them from the evidence in the case.

17 You are not to single out one instruction
18 alone as stating the law, but must consider the
19 instructions as a whole.

20 Neither are you to be concerned with the
21 wisdom of any rule of law stated by the Court.
22 Regardless of any opinion you may have as to what
23 the law ought to be, it would be a violation of
24 your sworn duty to base a verdict upon any other
25 view of the law than that given in the instructions

1
2 of the Court, just as it would be a violation of
3 your sworn duty, as judges of the facts, to base
4 a verdict upon anything but the evidence in the
5 case.

6 Justice through trial by jury must always
7 depend upon the willingness of each individual
8 juror to seek the truth as to the facts from the
9 same evidence presented to all the jurors, and to
10 arrive at a verdict by applying the same rules of
11 law as given in the instructions of the Court.

12 You have been chosen and sworn as jurors
13 in this case to try the issues of fact presented
14 by the allegations of the indictment and the
15 denial made by the "not guilty" plea of the accused.
16 You are to perform this duty without bias or pre-
17 judice as to any party. The law does not permit
18 jurors to be governed by sympathy, prejudice or
19 bias. Both the accused and the government expect
20 that you will carefully and impartially consider
21 all the evidence in the case, follow the law as
22 stated by the Court, and render a just verdict,
23 regardless of the consequences.

24 The attorneys, both for the government and
25 defendants, have been permitted by the Court and by

1
2 the rules to make opening statements and summations
3 to you. Under no circumstances are the statements
4 they have made by way of opening or by way of
5 summation to be taken as evidence. However, the
6 Court and the law do permit you to take the argu-
7 ments that they have proffered before you and weigh
8 those arguments. And if you agree with what they
9 have said on either side of the case, you may use
10 those arguments in your deliberations and in dis-
11 cussing the case with each other, and try to con-
12 vince one another as to what the final determination
13 shall be with reference to the deliberations at hand.

14 If you feel that the arguments are not com-
15 mensurate with the testimony and the proof in the
16 case, you may disregard them. The arguments are not
17 evidence. You need not weigh them. However, there
18 are times when the arguments of the attorneys will
19 give you an insight as to something you may have
20 missed, and you may discuss that portion of it if
21 you so desire.

22 As I have already instructed you, the Court
23 will be the judge of the law. You may recall that
24 some motions were argued at side bar or that you
25 were asked to leave the courtroom from time to time,

1
2 That was not for the purpose of keeping any of the
3 proof from you, but were matters of law that were
4 discussed between the attorneys and the Court
5 itself and should not have come before you. In
6 any event, if you feel that you have discovered by
7 some stretch of your imagination what this Court
8 thinks as to either some of the testimony or the
9 case itself, you should remove that from your
10 mind because I tell you here and now I have come
11 to no conclusion in this case. I have not indicated
12 to you in any way whatsoever what my feeling is
13 with reference to the facts in the case or with
14 reference to the guilt or innocence of the defendants.
15 That is your province and your job. You should not
16 try to weigh what you believe the Court's impression
17 may be.

18 You must understand that the lawyers who
19 appear before you are advocates. They are advocat-
20 ing the best case they can for the parties they
21 represent, and they have a right to exercise as
22 much forcefulness as they desire in their question-
23 ing or otherwise in presenting their case.

7 24 During my precharge I told you among other
25 things that the questions asked by the attorneys are

1
2 never to be considered as evidence, even though the
3 question may contain a statement of evidence. You
4 are reminded that only the answer to the question
5 is evidence, if, of course the question was answered.

6 Of course, you know by now that this case
7 has come before you by way of indictment presented
8 by a grand jury sitting in the Eastern District.
9 Remember, an indictment is merely an accusation,
10 merely a piece of paper. It is not evidence and is
11 not proof of anything.

8 12 The indictment reads: "From in or about and
13 between June 1975 up to the date of the filing of
14 this indictment, both dates being approximate and
15 inclusive, within the Eastern District of New York
16 and elsewhere, the defendants John McFarland, also
17 known as John Kane, Michael Thistlethwait, also
18 known as Mike Thistle, Alphonse Bifulco, Mario
19 Bifulco, and Roseann Polimeni, together with Larry
20 DeMaio, Robert Borsellino, John Kowalchick, and
21 Stephen Kopf, named herein as co-conspirators but
22 not as defendants, together with others known and
23 unknown to the grand jury, did knowingly and inten-
24 tionally combine, conspire, confederate and agree
25 to violate Section 841(a)(1) of Title 21, United

States Code.

"1. It was part of said conspiracy that the defendants and co-conspirators would knowingly and intentionally manufacture substantial quantities of phencyclidine, a Schedule III controlled substance.

"2. It was further a part of said conspiracy that the defendants and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute substantial quantities of phencyclidine, a Schedule III controlled substance.

"3. It was further a part of said conspiracy that the defendants and co-conspirators would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities."

This is under Title 21, United States Code, Section 846.

Some of the defendants named in the indictment have not been on trial here; some of them are out of this trial for various reasons. The reasons why the other defendants are not part of this trial have no bearing whatsoever on the guilt or innocence of either of the defendants who are on trial. You are not to speculate as to the reasons for the

1
2 absence from this trial of the other defendants named
3 in the indictment. You are to consider only the
4 guilt or innocence of the defendants before you here.

11/3 5 The indictment in this case charges a knowing
6 and intentional conspiracy to violate Section
7 841(a)(1) of Title 21, United States Code. That
8 section provides:

9 (a) It shall be unlawful for any person
10 knowingly or intentionally

11 (1) to manufacture, distribute or dispense,
12 or possess with intent to manufacture, distribute
13 or dispense, or possess with intent to manufacture,
14 distribute or dispense a controlled substance.

15 The essential elements of the charge involved
16 in this case may be stated as follows: First, there
17 must have been a conspiracy -- and I will discuss
18 conspiracy with you shortly. Second, the purpose
19 of the conspiracy must have been knowingly and
20 intentionally to manufacture, distribute or possess
21 with intent to distribute a controlled substance,
22 in this case phencyclidine, or "angel dust." Unless
23 you believe beyond a reasonable doubt that the sub-
24 stance involved in the conspiracy was in fact phen-
25 cyclidine, you cannot find these defendants guilty.

1
2 Third, the defendants must have knowingly, inten-
3 tionally, and willfully become members of the
4 conspiracy.

5 An act is done "knowingly" if done voluntarily
6 and intentionally, and not because of mistake or
7 accident or other innocent reason.

8 The purpose of adding the word "knowingly"
9 was to insure that no one would be convicted for an
10 act done because of mistake or accident or other
11 innocent reason.

12 An act is done willfully if done voluntarily
13 and intentionally and with the specific intent to
14 do something the law forbids, that is to say with
15 bad purpose either to disobey or disregard the law.

5 16 Let me state to you here that the burden is
17 upon the prosecution to prove beyond a reasonable
18 doubt each and every essential element of the crime
19 charged. Failure to do so requires you to find the
20 defendants not guilty. The burden never shifts to
21 the defendants to prove their innocence. The law
22 never imposes upon a defendant in a criminal case
23 the burden or duty of calling any witnesses or pro-
24 ducing any evidence.

6 25 This indictment charges a conspiracy to violate

1
2 the law. The concept of conspiracy is complicated,
3 so I direct you to listen very closely to what I am
4 about to say to you.

7
5 These defendants are charged with conspiring
6 to manufacture, distribute, or possess with intent
7 to manufacture or distribute, phencyclidine. In
8 order to convict, you must be convinced beyond a
9 reasonable doubt that they knowingly, intention-
10 ally and willfully entered into a conspiracy.
11 It is not sufficient that you find that they actually
12 used or did manufacture, distribute, or possess with
13 intent to distribute, the drug. On the other hand,
14 it is not necessary that you find that these par-
15 ticular defendants did in fact manufacture, distribute
16 or possess with intent to distribute, phencyclidine.
17 What you must find, in order to convict, is that the
18 defendants knowingly, intentionally, and willfully
19 entered into an agreement to violate the law, whether
20 or not that agreement was ever carried out by them.
21 It is the conspiracy itself which constitutes the
22 crime, and I will now discuss conspiracy with you.

8
23 A conspiracy is a combination of two or more
24 persons, by concerted action, to accomplish some
25 unlawful purpose, or to accomplish some lawful purpose

1
2 by unlawful means. So, a conspiracy is a kind of
3 partnership in criminal purposes, in which each
4 member becomes the agent of every other member.
5 The gist of the offense is a combination or agree-
6 ment to disobey or to disregard the law.

7 Mere similarity of conduct among various
8 persons, and the fact they may have associated with
9 each other and may have assembled together and dis-
10 cussed common aims and interests does not necessarily
11 establish proof of the existence of a conspiracy.

12 However, the evidence in the case need not
13 show that the members entered into any express or
14 formal agreement or that they directly, by words
9 15 spoken or in writing, stated between themselves what
16 their object or purpose was to be, or the details
17 thereof, or the means by which the object or purpose
18 was to be accomplished. What the evidence in the
19 case must show beyond a reasonable doubt, in order
20 to establish proof that a conspiracy existed, is
21 that the members in some way or manner, or through
10 22 some contrivance, expressly or tacitly came to a
23 mutual understanding to try to accomplish a common
24 and unlawful plan. The evidence in the case must
25 also establish beyond a reasonable doubt that the

1
2 alleged conspiracy was knowingly formed, as charged
3 in the indictment, and that two or more persons,
4 including one or more of the accused, were knowingly
5 members of the conspiracy, as charged in the indict-
6 ment.

7 The indictment charges that as part of the
8 alleged conspiracy the defendant would manufacture,
9 distribute, and possess with intent to distribute,
10 pencyclidine. In order to find any of the defen-
11 dants guilty, you must be convinced beyond reasonable
12 doubt as to that particular defendant that he was a
13 member of a conspiracy and that at least one of the
14 three purposes I have just mentioned was a part of
15 that conspiracy.

11 16 The term "manufacture" in this context has the
17 same meaning as in any other context; that is, that
18 the members of the conspiracy would make the con-
19 trolled substance.

20 The term "distribute" in this context means
21 to deliver a controlled substance to the possession
22 of another person, which in turn means the actual,
23 constructive, or attempted transfer of a controlled
24 substance.

25 The phrase "possess with intent to distribute"

1
2 involves two distinct terms: "possession" and
3 "intent." Before you may find that a part of the
4 alleged conspiracy was to possess phencyclidine
5 with intent to distribute it, you must be convinced
6 beyond a reasonable doubt that the intended posses-
7 sion was with the specific purpose to distribute
8 it, as I have already defined "distribute" for you.
12 9 The specific purpose to possess with the intent to
10 distribute means more than the general intent to
11 possess the drug. Such purpose may be determined
12 from all the facts and circumstances surrounding the
13 case, but unless this specific purpose has been
14 proven beyond a reasonable doubt, the government
15 has not carried its burden with respect to the charge
16 of conspiracy to possess with intent to distribute
17 phencyclidine.

18 The law recognizes two kinds of possession:
19 actual possession and constructive possession. A
20 person who knowingly has direct physical control
21 over a thing at a given time is then in actual
22 possession of it. A person who, although not in
23 actual possession, knowingly has both the power and
24 the intention, at a given time, to exercise dominion
25 or control over a thing, either directly or through

another person or persons, is then in constructive possession of it.

The law also recognizes that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.

If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit that defendant. In other words, to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy.

Charge of the Court

15 1
2 In determining whether there has been an
3 unlawful agreement, you may judge acts and conduct
4 of the alleged members of the conspiracy which are
5 done to carry out an apparent criminal purpose.
6 The adage, "Actions speak louder than words," is
7 applicable here. Usually, the only evidence avail-
8 able is that of disconnected acts on the part of
9 the alleged individual conspirators, which acts,
10 however, when taken together in connection with
11 each other and with the reasonable inferences
12 flowing therefrom, show a conspiracy or agreement
13 to secure a particular result as satisfactorily
14 and conclusively as more direct proof.

15 If, upon such consideration of all the
16 evidence, direct or circumstantial, you find beyond
17 a reasonable doubt that the minds of the alleged
18 conspirators met in an understanding way and that
19 they agreed, as I have explained a conspiratorial
20 agreement to you, to work together in furtherance
21 of the unlawful schemes alleged in the indictment,
22 then proof of the existence of conspiracy is established.

16 23 In determining whether a conspiracy existed,
24 you should consider the actions and declarations of
25 all of the alleged participants made in furtherance

1
2 of the common scheme. However, in determining
3 whether a particular defendant was a member of the
4 conspiracy, you should consider only his or her acts
5 and statements. He or she cannot be bound by the
6 acts or declarations of other participants until
7 it is established that a conspiracy existed, and that
8 he or she was one of its members.

17 9 Whenever it appears beyond a reasonable
10 doubt, however, that a conspiracy existed and that
11 a defendant was one of its members, then the state-
12 ments thereafter knowingly made and the acts there-
13 after knowingly done by some other member of the
14 conspiracy may be considered by you as evidence
15 against the defendant found to have been a member,
16 even though the statements and acts may have
17 occurred in the absence and without the knowledge
18 of that defendant, provided such statements and
19 acts were knowingly made or done during the con-
20 tinuation of the conspiracy, and in furtherance of
21 some object or purpose of the conspiracy.

22 Any statements or acts of any conspirator,
23 which are not made or done in furtherance of the
24 conspiracy, or which are made or done before its
25 existence or after its termination may not be

18 considered as evidence against anyone other than the maker or actor.

19 The guilt of a conspirator is not governed by the extent or duration of his participation in the conspiracy, or whether he or she had knowledge of all of its operations. Even if one joined the conspiracy after it was formed, and was engaged in it to a degree more limited than that of other co-conspirators, he or she is equally culpable so long as he or she was a co-conspirator. Each member of a conspiracy may perform separate and distinct acts at different times and different places. Thus, some conspirators may play major roles, while others play minor parts.

20 In other words, it is not required that a person be a member of the conspiracy from its very start -- he or she may join it at any point during its progress and be held responsible for all that has been done before he or she joined, and all that may be done thereafter during its existence, and may be charged with the same responsibility as if he or she had been one of the originators or instigators of the conspiracy. On the other hand, a person who has no knowledge of the conspiracy but happens to act

in a way that furthers some object or purpose of the conspiracy does not thereby become a conspirator.

Although I have just explained conspiracy to you in great detail, I will summarize, for the sake of clarity, the elements which must be proved beyond a reasonable doubt in order to find a defendant guilty of conspiracy:

First: That the conspiracy described in the indictment was willfully formed, and was existing at or about the time alleged;

Second: That the accused willfully became a member of the conspiracy;

Third: That one of the conspirators thereafter committed an overt act in furtherance of the conspiracy; and

Fourth: That such overt act was knowingly done in furtherance of some object or purpose of the conspiracy, as charged.

If you should find beyond a reasonable doubt from the evidence in the case that existence of the conspiracy charged in the indictment has been proved and that during the existence of the conspiracy some overt act was knowingly done by one of the members of the conspiracy in furtherance of some object or

1
2 purpose of the conspiracy, then proof of the con-
3 spiracy offense charged is complete.

48
4 An overt act is any act knowingly committed
5 by one of the defendants or co-conspirators in an
6 effort to effect or accomplish some object or
7 purpose of the conspiracy. The overt act need not
8 be criminal in nature, if considered separately and
9 apart from the conspiracy. It may be as innocent
10 as the act of a man walking across the street, or
11 driving an automobile, or using a telephone. It
12 must, however, be an act which follows and tends
13 toward accomplishment of the plan or scheme, and
14 must be knowingly done in furtherance of some
15 object or purpose of the conspiracy charged in the
16 indictment.

49
17 In your consideration of the evidence in the
18 case as to the offense of conspiracy charged, you
19 should first determine whether or not the conspiracy
20 existed, as alleged in the indictment. If you con-
21 clude that the conspiracy did not exist-- I'll
22 rephrase. If you conclude that the conspiracy did
23 exist, you should next determine whether or not the
24 accused willfully became a member of the conspiracy.

25 If you are not convinced beyond a reasonable

doubt from the evidence in the case that the conspiracy alleged in the indictment was willfully formed and that the accused willfully became a member of the conspiracy either at its inception or afterwards, and that thereafter one or more of the conspirators knowingly committed one or more of the overt acts charged in furtherance of some object or purpose of the conspiracy, then you must acquit the accused.

If, however, you are convinced of these factors beyond a reasonable doubt, then you may convict each defendant as to whom you have no reasonable doubt.

Let me admonish you here that it is your duty to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze all of the evidence with respect to each defendant separately. You may find all of the defendants guilty, all of the defendants not guilty, or some defendants guilty and others not guilty. The fact that you may find one of the defendants guilty should not influence your verdict as to the other defendants. You must determine the case of each defendant solely upon that evidence

which you find applicable to him or her.

There has been testimony in this case regarding certain threats made against Michael Thistlewaite and his grandmother. In this regard, you should be aware that coercion or compulsion may provide a legal excuse for the crime charged in the indictment. In order, however, to provide a legal excuse for criminal conduct, the coercion must consist of the following elements:

(1) The coercion to act must be present at all times that a defendant acted in furtherance of the conspiracy.

(2) The danger must be immediate. A fear of future danger to life or body is not sufficient to relieve an accused of responsibility.

(3) The coercion must be of such a nature as to induce a well-founded fear of impending death or serious bodily injury, and

(4) There must be no reasonable opportunity to escape the compulsion without committing the crime; or, to say it otherwise, that there is no reasonable alternative to committing the crime -- you can't call the police, you can't do anything except commit the crime.

1
2 If the evidence in the case should leave
3 you with a reasonable doubt whether a defendant
4 acted or failed to act willingly and voluntarily,
5 that is to say, whether a defendant was forced
6 in effect to commit or aid in the commission of
7 the crime charged in the indictment by coercion
8 or compulsion as just explained, then you must
9 acquit the defendant.

10 Remember that the burden is always on the
11 prosecution to prove beyond a reasonable doubt every
12 essential element of a crime charged, and the law
13 never imposes upon a defendant the burden or duty
14 of calling any witnesses, or producing any evidence.

24 15 There are two types of evidence from which
16 you may find the truth as to the facts of a case,
17 direct and circumstantial evidence. Direct evidence
18 is the testimony of one who asserts actual knowledge
19 of a fact, such as an eyewitness. Circumstantial
20 evidence is proof of a chain of facts and circum-
21 stances indicating the guilt or innocence of a
22 defendant. The law makes no distinction between
23 the weight to be given to either direct or circum-
24 stantial evidence. Nor is a greater degree of
25 certainty required of circumstantial evidence than

1
2 of direct evidence. You should weigh all the
3 evidence in the case. After weighing all the
4 evidence, if you are not convinced of the guilt
5 of the defendant beyond a reasonable doubt, you
6 must find him or her not guilty.

25 7 A defendant is presumed innocent of the
8 crime. Thus the defendant, although accused, begins
9 the trial with a clean slate and with no evidence
10 against him, and the law permits nothing but legal
11 evidence to be presented before a jury to be consider-
12 ed in support of any charge against the accused. So
13 the presumption of innocence alone is sufficient to
14 acquit a defendant unless you, the jury, are satis-
15 fied beyond a reasonable doubt of the defendant's
16 guilt after careful and impartial consideration of
17 all the evidence in the case.

18 It is not required that the government prove
19 guilt beyond all possible doubt. The test is one of
20 reasonable doubt, and reasonable doubt is doubt
21 based upon reason and common sense, the kind of
22 doubt that would make a reasonable person hesitate
23 to act. Proof beyond a reasonable doubt must,
24 therefore, be proof of such a convincing character
25 that you would be willing to rely and act upon it

unhesitatingly in the most important of your own affairs.

You, the jury, will remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. If the jury views the evidence in the case as reasonably permitting either of two conclusions, one of innocence, the other of guilt, you, the jury, must, of course, adopt the conclusion of innocence.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof.

You, the jury, may make common sense inferences from the proven facts.

It is not necessary that all inferences drawn

1
2 from the facts in evidence be consistent only with
3 guilt and inconsistent with every reasonable
4 hypothesis of innocence.

5 The test is one of reasonable doubt, and
6 should be based upon all the evidence, the testimony
7 of the witnesses, the documents offered into evi-
8 dence and the reasonable inferences which can be
9 drawn from the proven facts.

10 An inference is a deduction or conclusion
11 which reason and common sense lead the jury to draw
12 from the facts which have been proved. You are to
13 consider only the evidence in the case. But in
14 your consideration of the evidence you are not
15 limited to the bald statements of the witnesses.
16 On the contrary, you are permitted to draw, from
17 the facts which you find have been proved, such
18 reasonable inferences as seem justified in the
19 light of your own experience.

20 There has been evidence in the case concern-
21 ing receipts from a chemical company. I charge you
22 that the purchase of any of the chemicals listed on
23 these receipts is not a crime, since it is not a
24 crime to purchase or possess those particular chemi-
25 cals. Naturally, however, you may consider that

28

29

1
2 evidence along with all the other evidence in the
3 case in determining whether a defendant was a
4 willful and knowing member of a conspiracy.

5 You as jurors are the sole judges of the
6 credibility of the witnesses and the weight their
7 testimony deserves, and it goes without saying
8 that you should scrutinize all the testimony given,
9 the circumstances under which each witness has
10 testified, and every matter in evidence which tends
11 to show whether a witness is worthy of belief.
12 Consider each witness's intelligence, motive and
13 state of mind, and his or her demeanor and manner
14 while on the stand. Consider the witness's ability
15 to observe the matters as to which he or she has
16 testified, and whether he or she impresses you as
17 having an accurate recollection of these matters.
18 Consider also any relation each witness may bear
19 to either side of the case; the manner in which
20 each witness might be affected by the verdict,
21 and the extent to which, if at all, each witness
22 is either supported or contradicted by other
23 evidence in the case.

24 Inconsistencies or discrepancies in the
25 testimony of a witness, or between the testimony

1
2 of different witnesses, may or may not cause the
3 jury to discredit such testimony. Two or more
4 persons witnessing an incident or a transaction
5 may see or hear it differently, and innocent mis-
6 recollection, like failure of recollection, is not
7 an uncommon experience.

8 In weighing the effect of a discrepancy,
9 always consider whether it pertains to a matter of
10 importance or an unimportant detail, and whether
11 the discrepancy results from innocent error or
12 intentional falsehood.

13 After making your own judgment, you will
14 give the testimony of each witness such credibility,
15 if any, as you may think it deserves.

16 You may find the testimony of a smaller
17 number of witnesses on one side is more credible
18 than the testimony of a greater number of witnesses
19 on the other side.

20 You are not obliged to accept testimony, even
21 though the testimony is uncontradicted and the
22 witness is not impeached. You may decide, because of
23 the witness's bearing and demeanor, or because of
24 the inherent improbability of his or her testimony,
25 or for other reasons sufficient to you, that such

1
2 testimony is not worthy of belief.

3 The government is not required to prove the
4 essential elements of the offense as defined in
5 these instructions by any particular number of
6 witnesses. The testimony of a single witness may
7 be sufficient to convince you beyond a reasonable
8 doubt of the existence of an essential element of
9 the offense charged, if you believe beyond a
10 reasonable doubt that the witness is telling the
11 truth.

12 I must go back to a page, because the pages
13 were stuck together. I will go back to the following:

14 Inconsistencies or discrepancies in the
15 testimony of a witness, or between the testimony of
16 different witnesses, may or may not cause the jury
17 to discredit such testimony. Two or more persons
18 witnessing an incident or a transaction may see or
19 hear it differently; and innocent misrecollection,
20 like failure of recollection, is not an uncommon
21 experience.

22 In weighing the effect of a discrepancy,
23 always consider whether it pertains to a matter of
24 importance or an unimportant detail, and whether
25 the discrepancy results from innocent error or

intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

If you find any witness lied as to any material fact in the case, or willfully testified falsely, then the law gives you certain privileges. One of those privileges is that you have the right to disregard the entire testimony of that witness. If you find, however, that you can sift through that testimony and determine which of the testimony is true and which was false, then the law allows you to take the portions which were true and weigh them and disregard those portions which were false. That again is within your prerogative.

The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credence. You may find the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

1
2 You are not obliged to accept testimony,
3 even though the testimony is uncontradicted and
4 the witness is not impeached. You may decide,
5 because of the witness's bearing and demeanor, or
6 because of the inherent improbability of his or
7 her testimony, or for other reasons sufficient
8 to you, that such testimony is not worthy of belief.

9 The government is not required to prove the
10 essential elements of the offense as defined in
11 these instructions by any particular number of
12 witnesses. The testimony of a single witness may
13 be sufficient to convince you beyond a reasonable
14 doubt of the existence of an essential element of
15 the offense charged, if you believe beyond a
16 reasonable doubt that the witness is telling the
17 truth.

18 The testimony of a witness may be discredited
19 or impeached by showing that he or she previously
20 made statements which are inconsistent with his pres-
21 ent testimony. The earlier contradictory statements
22 are admissible only to impeach the credibility of
23 the witness and not to establish the truth of these
24 statements. It is the province of the jury to
25 determine the credibility, if any, to be given the

testimony of a witness who has been impeached.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars, and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

Some of the witnesses who testified before you here were admitted participants in the crime with which these defendants are charged. Such a person does not become incompetent as a witness simply because of his participation in the crime charged. The mere fact that a witness may have participated in the crime charged does not mean that he cannot tell the truth. It only means that you are to examine his testimony with great care, and if, having done so, you believe it to be the truth, then you are to give it the same credence as the testimony of other witnesses. The testimony of such a person alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty even if uncorroborated or unsupported by other evidence. Keep in mind, however, that you must receive such testimony with caution and weigh

37 it with great care before you accept it. You should not convict on the basis of the unsupported testimony of a participant in the crime unless you believe such testimony beyond a reasonable doubt.

Certain witnesses who testified before you here have received consideration from the government in exchange for their testimony. Such testimony must be examined and weighed by you with greater care than the testimony of an ordinary witness. Again, this does not mean that such a person cannot tell the truth, but you must determine whether such testimony has been affected by interest or by prejudice against the defendant. If, after such consideration, you find such testimony to be truthful, you may give it whatever weight you believe it deserves.

38 The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn from the failure of a defendant to testify.

As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

39

There is nothing peculiarly different in the way a jury should consider the evidence in a criminal case from that which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense; you are not to compromise your position. Consider the evidence in the case for only those purposes for which it has been admitted, and give it a reasonable and fair construction, in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If an accused be proved guilty beyond reasonable doubt, say so; if not so proved guilty, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict of guilty upon anything other than the evidence in the case; and remember as well that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

41

In making the factual determination on which your verdict will be based, you may consider only the exhibits which have been admitted in evidence and the testimony of the witnesses as you have heard it in this courtroom.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

42 The punishment provided by law for the offenses charged in the indictment is a matter exclusively within the province of the Court, and should never be considered by you in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

43 If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

44 Now, in this type of case there must be a unanimous verdict. That means that all twelve of you must agree, and it goes without saying that it becomes incumbent upon you to listen to one another and to argue out the points among yourselves in order to determine in good conscience whether your fellow jurors' argument is one commensurate with yours or whether you can with good conscience agree with him. You have no right to stubbornly and idly sit by and say, "I am not talking to anyone. I am not going to discuss it," because people with common sense and the ability to reason must communicate their thoughts. So anything which appears in the record and about which one of you may not agree,

1
2 talk it out amongst yourselves, and then if you
3 can't agree as to what is in the record, you can
4 ask the Court to have that portion of the testimony
5 read back to you.

6 Try to be precise if you want testimony re-
7 read. We want to avoid rereading large portions
8 of the record if we can. If you want testimony
9 reread, knock on the door and give a note in
10 writing to the marshal, who will then present it
11 to me, and I will then bring you into the court-
12 room.

13 Juror No. 1, you're the foreman. You will
14 preside over your deliberations and will be spokesman
15 here in court.

16 The Court will now announce the type of
17 verdict you may render in this case.

18 If you should come to the conclusion that
19 all the defendants are not guilty, then the form
20 of your verdict will be, "We, the jury, announce
21 that we find all the defendants not guilty."

22 If you should find all the defendants
23 guilty, then, Mr. Foreman, the form of your verdict
24 will be, "We, the jury, find all defendants guilty."

25 If you should find a particular defendant

1
2 guilty and another defendant not guilty, that you
3 would announce your verdict as to each defendant
4 as to your finding and announce those of whom
5 you find not guilty and those of whom you find
6 guilty. Any one and all defendants are to be
7 treated separately in announcing a separate verdict
8 as to each defendant, if you have alternatives of
9 acquittal and guilty verdicts.

10 That's the Court's charge.

11 We will take exceptions on the side.

12 (Side bar)

13 MR. HEINEMANN: For the defendant McFarland,
14 I respectfully except to your Honor's charge in so
15 far as you failed to charge as I requested.

16 THE COURT: That's noted already. This is
17 only for something I read or misread.

18 MR. GREEN: Do you want from the government
19 first?

20 THE COURT: Anyone, I don't care.

21 MR. WEINBACH: Your Honor, I myself as a
22 lawyer have never understood the difference between
23 intentionally, knowingly and willfully; however,
24 you did define knowingly and you did define will-
25 fully, and since they are charged with intentionally,

1 willfully and knowingly, I wonder perhaps--

2 THE COURT: Specific intent?

3 MR. WEINBACH: Just the definition of
4 intentional.

5 MR. QUAGLIATA: That's already covered.

6 THE COURT: Willfully and knowingly done.
7 It's in there.

8 MR. HEINEMANN: Defendant McFarland has no
9 objection not to going into intentionally.

10 THE COURT: It's already been gone into.

11 MR. GREEN: I have only one matter. We
12 should have brought it to your attention, where you
13 read some of the defendants names in the indictment
14 have not been on trial here. I think it should
15 be one of the defendants, because---

16 MR. WEINBACH: It should be some of the co-
17 conspirators.

18 MR. HEINEMANN: I don't think that's what's
19 meant.

20 THE COURT: Two of the defendants are not on
21 trial here.

22 MR. HEINEMANN: Mr. DeMaio was only a co-
23 conspirator.

24 THE COURT: I will direct that to say only
25 one of the defendants are not on trial. The others

1 unindicted co-conspirators. Let's leave it that way,
2 make it specific.

3 MR. WEINBACH: Your Honor, just one point.
4 The indictment says from June '75 to the date of
5 the filing of this indictment.

6 THE COURT: I will give the date of the
7 filing of the indictment.

8 MR. WEINBACH: I think it's December, '76.

9 MR. DIAMOND: December 29th.

10 MR. QUAGLIATA: Would you mention, Judge,
11 that they're unindicted co-conspirators?

12 THE COURT: I'm going to say that.

13 MR. DIAMOND: Thank you, your Honor.

14 THE COURT: Generally I don't do it, but I'll
15 do it in this case.

16 MR. WEINBACH: Miss Polimeni was an indicted
17 co-conspirator.

18 THE COURT: Yes.

19 (In open court)

20 THE COURT: Just for clarification purposes,
21 where the Court said that some of the defendants
22 were not on trial here, actually, there's only one
23 defendant mentioned in the indictment. That's Rose-
24 anne Polimeni, who was a defendant. Mr. DeMaio was
25 an unindicted co-conspirator. He would not be on

1 trial since he has not been indicted.

2 Secondly, I said from the date, gave you the
3 date of the indictment, which would include the
4 dates for the conspiracy; actually, the date of
5 indictment is December 29th, 1976. We would have that
6 period in which you're to discuss and determine
7 whether or not there was a conspiracy and if so, who
8 was involved in that conspiracy.

9 Are the marshals here?

10 THE CLERK: Yes, your Honor.

11 (Two marshals were duly sworn.)

12 THE COURT: I do have one additional item
13 I wish to advise the jury.

14 All exhibits will be brought, sent in; you
15 may request them either way, except the chemicals
16 will not be sent to you in the jury room. Either
17 the chemicals or the angel dust that the chemist said
18 was in that little brown envelope packet. You
19 would not have those. I find no reason for you
20 having to pass it around to each other. If you
21 wish to look at them, we'll put them back on the
22 table. You may come out and sit where you were
23 during the trial, and you may observe them from
24 there. Everything else that's in evidence will be
25 sent in too, and something not sent in and you

1 wish to have it, you may have it.

2 If you recall, I told you exhibits marked
3 for identification are not in evidence. You recall
4 I said that to you, so don't ask for those.

5 What I'm going to do, I'm going to have you
6 start deliberating -- I'm going to have you taken
7 out to lunch. This is the time you'll be taken out
8 to lunch. The two alternates, I will permit you
9 to go to lunch with the jury, but you're not to
10 talk about the case at all, not even at this point
11 now, and then immediately after you finish your
12 lunch, the two alternates -- you can step down now,
13 so you're not part of the jury. You're being
14 excused. Then you may go directly home, need
15 not come back to the courtroom, but you will go
16 to lunch with the jury.

17 (Two alternates step down from the jury box.)

18 THE COURT: The court is recessing at this
19 time for the jury to go out to lunch, to start
20 deliberating as soon as they get back.

21 (Jury leaves the courtroom.)

22 MR. DIAMOND: Do you know where they're
23 going to lunch?

24 THE COURT: Foffe's.

25 MR. HEINEMANN: Does your Honor have an idea

1 where the jurors go to lunch?

2 THE COURT: Foffe's.

3 MR. QUAGLIATA: Are we free to go to lunch?

4 THE COURT: Be back at 2:30.

5 MR. QUAGLIATA: What is your procedure
6 regarding exhibits?

7 THE COURT: We automatically send them in.

8 MR. QUAGLIATA: You want a waiver to that
9 effect?

10 THE COURT: Attorneys, if you're not here,
11 the Court will send in all exhibits to the jury
12 as I've instructed; do you all waive the right to
13 be present when they're sent in?

14 MR. GREEN: Yes.

15 MR. QUAGLIATA: Yes.

16 MR. HEINEMANN: No objection.

17 MR. DIAMOND: No objection.

18 THE COURT: I usually send in a copy of
19 the indictment.

20 MR. QUAGLIATA: No objection.

21 (Time noted: 12:30 p.m.)

22 LeG fols

23

24

25

lpml 1 (Whereupon Court reconvened at 3:50 P.M.)

2 THE COURT: Now, you have all seen the note,
3 am I right?

4 In response to the note the following
5 statement will be made to the jury.

6 The indictment charges that all of these
7 defendants were members of a conspiracy that had
8 three parts, (1) to knowingly and intentionally
9 manufacture phencyclidine; (2) to knowingly and
10 intentionally distribute phencyclidine; (3) to
11 possess phencyclidine with intent to distribute it.

12 First you must determine whether a conspiracy
13 as charged in the indictment existed. If you find
14 that no conspiracy existed as charged, then of course
15 you must acquit all the defendants. If you are
16 convinced beyond a reasonable doubt that a conspiracy
17 existed, you must then tell me whether the conspiracy
18 encompassed all three of the parts charged in the
19 indictment, only two of the parts, or only one of the
20 parts. Once you have determined that issue you
21 must then determine whether an individual defendant
22 wilfully and knowingly became a member of that
23 conspiracy.

24 If you find that an individual defendant was
25 involved in only one of the parts as enumerated in-

1 the indictment, but that part was not one of the
2 purposes of the conspiracy, then you must acquit that
3 defendant.

4 Remember that it is an unlawful agreement and
5 not an act that forms the basis of the charge under
6 this section of law. I remind you to consider what
7 I am saying in conjunction with what I have already
8 instructed you on conspiracy.

9 MR. WEINBACH: With all due respect, I have
10 difficulty in understanding part of that charge.

11 THE COURT: Why?

12 MR. WEINBACH: I think what they're asking is
13 it possible to convict one of the defendants if we
14 are understanding him, only to be part of the
15 conspiracy, for example to distribute, and the answer
16 is yes.

17 MR. QUAGLIATA: No.

18 THE COURT: If the conspiracy was only to
19 manufacture, even if they distributed, that's not
20 what you're charging them. You're saying if there
21 is an unlawful act you can't convict. No question
22 in my mind.

23 MR. WEINBACH: What I'm saying is if these
24 charge a conspiracy to manufacture, distribute and
25 possess with intent to distribute, if they find that

1 the four individuals, whichever conspired -- what
2 the jury is asking, do we have to find all three
3 purposes satisfied before we convict.

4 THE COURT: I say they don't have to find
5 that. They could find any one of the three was the
6 purpose of the conspiracy.

7 MR. WEINBACH: I'm not sure that that is clear.

8 THE COURT: Listen to it. "If you are con-
9 vinced beyond a reasonable doubt that a conspiracy
10 existed, you must then determine whether the
11 conspiracy encompassed all three of the parts
12 charged in the indictment, only two of the parts, or
13 only one of the parts. Once you have determined
14 that issue you must then determine whether an
15 individual defendant wilfully and knowingly became
16 a member of that conspiracy."

17 Now, they have found that they agreed to
18 something, whatever it may be.

19 MR. WEINBACH: Right.

20 THE COURT: You must then determine whether
21 the conspiracy encompassed all three of the purposes
22 of the parts charged, that's the first condition.
23 In other words, the conspiracy could have been for
24 all three, if they find for all three they convict;
25 if they find for only two and those two they agreed

1 to perform part of the conspiracy, then they convict
2 likewise; if they find only one, and they find that
3 that was the purpose of the agreement, they convict
4 likewise; if they find one which was not the purpose
5 of the conspiracy -- let's say they find to
6 distribute -- you're asking me to charge them with
7 a substantive crime.

8 MR. QUAGLIATA: They mention all of them in
9 the indictment, where the subsequent crime in this
10 case -- it says the purpose of the --

11 THE COURT: You enumerated all purposes. It
12 is for the jury to determine whether three of them
13 were part of it or only one was part of the
14 conspiracy or none of them.

15 MR. WEINBACH: I don't have any dispute with
16 you on the law.

17 THE COURT: I hope not.

18 MR. WEINBACH: The only thing I'm making
19 a suggestion, with all due respect, from that note
20 I think what they are really asking if there's only
21 one --

22 THE COURT: Mr. Weinbach, I wouldn't leave
23 you out in the cold. When he charges conspiracy,
24 they are talking about me -- when he charges
25 conspiracy to manufacture, distribution and possession,

1 if we find any individual innocent of any are we
2 supposed to acquit him of the whole charge. And the
3 answer is no.

4 MR. WEINBACH: Then I would ask you to --

5 THE COURT: And with that I will then read
6 this.

7 MR. WEINBACH: Then I ask you --

8 MR. QUAGLIATA: The answer is yes.

9 THE COURT: The answer is not yes to this,
10 the answer is no.

11 MR. GREEN: I don't think you could answer that
12 question. I think you must read them the law.

13 THE COURT: Then I'll say in conjunction with the
14 law the answer is no to your question but --

15 MR. WEINBACH: They are asking you for a
16 specific --

17 THE COURT: Read it.

18 MR. GREEN: I've read it.

19 THE COURT: The answer if they find the purpose
20 of the conspiracy was to manufacture, and they find
21 them guilty of possession, they still can convict.

22 MR. QUAGLIATA: They may be talking about one,
23 two or three.

24 MR. WEINBACH: I think it's clear as a bell.

25 MR. GREEN: Now it is.

1 THE COURT: I'll add on this part to this so
2 we don't have any confusion. I'll read the questions
3 and I'll say to them, the question that I've read is
4 answered by the statement by the Court as the law.
5 However, you must understand what I've said in
6 reference to your question does not in any way affect
7 the innocence or guilt of that defendant.

8 MR. GREEN: What I'm suggesting is read the
9 law as you read it to them the first time.

10 THE COURT: I'm going to read them the law
11 but the answer to their question is no; it can't
12 be yes, it's self-evident because my statement to
13 them is it's a three-part charge.

14 MR. HEINEMAN: Then that should be your
15 answer.

16 THE COURT: Not necessarily, and you must
17 submit your question in conjunction with the statement
18 of law that I will now give you.

19 MR. WEINBACH: Not necessarily is going to
20 confuse them.

21 THE COURT: I asked them if they are confused.

22 MR. WEINBACH: That question is clear as a
23 bell.

24 MR. DIAMOND: Ask the foreman to rephrase the
25 question. You can't answer it that way.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: I don't want to be an advocate.

MR. QUAGLIA: You don't know what they are

thinking about.

THE COURT: I'll read their question and ask

them whether or not they wish me to give them any

further information.

MR. WEINBACH: May I just make a statement,

Your Honor? It seems to me, and I again state it

for the record, that that question is clear as well

as the law with respect to that question. The answer

to that question is a positive no, it's not a "not

necessarily."

THE COURT: The answer "no" subject to the

statement on the law that the Court will give you.

MR. WEINBACH: If you say "not necessarily."

THE COURT: I'll do it this way. The answer

is "no" subject to the explanation the Court will now

give you.

MR. HEINEMAN: I think it dignifies their

question too much. I wouldn't answer it. Your Honor

is going to show according to what you just told us --

THE COURT: I have been through these wars so

many times.

MR. HEINEMAN: Your Honor said they may find it

there was a conspiracy to do any of the three things.

1 THE COURT: The answer is "no" but it's
2 qualified.

3 MR. QUAGLIATA: The answer is yes, and I'll
4 tell you why. They state in paragraph 2 of their
5 own indictment, which they drafted --

6 THE COURT: We are talking about their
7 question which says if we find any individual innocent
8 of any one are we supposed to acquit him of the whole
9 charge. The answer is no because if they find --

10 MR. QUAGLIATA: But they have told you what
11 the purpose of conspiracy -- they told you in the
12 indictment that it was further part of the conspiracy
13 that the defendant and co-conspirators would knowingly
14 and intentionally distribute and possess with intent
15 to distribute.

16 THE COURT: But any one of the three.

17 MR. QUAGLIATA: They have limited themselves.

18 THE COURT: The Government need not prove
19 all three of them. The Government must prove the
20 purpose of the conspiracy, all three; or if the
21 jury finds it was only one, they may find one
22 purpose.

23 MR. HEINEMAN: We don't have a special verdict
24 here.

25 Your Honor is varying and amending the

1 indictment. Mr. Weinbach has clearly charged four
2 essential possibilities.

3 THE COURT: We could add this on -- the same
4 thing I'm saying. After the end of what I'm saying
5 in conjunction with what I've already instructed you
6 -- in other words, if you are convinced -- no, that
7 would come after the next to the last paragraph.

8 In other words, if you are convinced beyond a
9 reasonable doubt of the existence of a conspiracy
10 you can only convict a defendant if he was involved
11 in one of the parts which was in fact encompassed
12 within the conspiracy otherwise you must acquit.

13 MR. QUAGLIATA: Judge, they have told us in
14 their indictment what the purpose of the conspiracy
15 is.

16 THE COURT: They have said in their indictment
17 "we intend to prove that these persons have met to
18 have an unlawful agreement, number one to manufacture;
19 number two to distribute."

20 MR. QUAGLIATA: And they use --

21 THE COURT: You don't have to do all three.
22 If the jury finds it's only to manufacture, that was
23 the agreement, they don't have to find that.

24 MR. QUAGLIATA: Most respectfully except.
25 You can't answer the question yes or no anyway

1 because you don't know what they consider the
2 conspiracy to be.

3 THE COURT: I could answer their question --
4 if we find any individual innocent of any one are
5 we supposed to acquit him of the whole charge -- no,
6 subject to the explanation the Court will now read
7 to you.

8 MR. GREEN: I would ask you to read what you
9 said. If it doesn't clear it up in the jury room
10 you may send up another note.

11 MR. WEINBACH: Let's get them out. They are
12 asking you a question, you are a judge of the law
13 and it seems to me that it's quite clear what they're
14 thinking of is for example, if they think that one
15 of the defendants did not conspire, say, to possess
16 with intent to distribute, can they acquit him,
17 because we can't prove that particular purpose.

18 THE COURT: That's what I say.

19 MR. QUAGLIATA: Mr. Weinbach is the only
20 person that knows what a jury is thinking, nobody
21 else knows.

22 MR. GREEN: The question can't be answered
23 yes or no.

24 THE COURT: I will resist. I will say this.
25 I'll read their question to them, I'll give them an

1 explanation. If they're not satisfied then I'll
2 give them the answer.

3 MR. WEINBACH: Tell them the answer to that
4 question is no, subject to my explanation.

5 MR. HEINEMAN: I just except with Mr. Quagliata.

6 MR. GREEN: And I join in, Judge.

7 MR. WEINBACH: They are entitled to an answer
8 to the question.

9 MR. GREEN: If he knew what the question is.

10 MR. WEINBACH: That question is clear as a
11 bell. I don't see what the problem is by saying no
12 and I'll explain it.

13 THE COURT: Bring them in.

14 (Whereupon jurors entered the courtroom at
15 4:30 and are now seated in the jury box.)

16 THE COURT: First I'll read the question
17 that you have submitted to the Court and the question
18 is: "When he charges" -- I suppose you are talking
19 about myself -- "when he charged conspiracy to
20 manufacture, distribution and possession, if we find
21 any individual innocent of any one are we supposed
22 to acquit him of the whole charge."

23 That really can't be answered yes or no at
24 this point, so I'll give you an explanation.

25 The indictment charges that all of these

1 defendants were members of a conspiracy which had
2 three parts: (1) to knowingly and intentionally
3 manufacture phencyclidine; (2) to knowingly and
4 intentionally distribute phencyclidine; (3) to possess
5 phencyclidine with intent to distribute it.

6 First, you must tell me whether a conspiracy
7 as charged in the indictment existed. If you find
8 that no conspiracy existed as charged then of course
9 you must acquit all the defendants. If you are
10 convinced beyond a reasonable doubt that a conspiracy
11 existed, you must tell me whether the conspiracy
12 encompassed all three of the parts charged in the
13 indictment, only two of the parts, or only one of
14 the parts. Once you have determined that issue you
15 must then determine whether an individual defendant
16 wilfully and knowingly became a member of that
17 conspiracy.

18 If you find that an individual defendant
19 was involved in only one of the parts as enumerated
20 in the indictment, but that part was not one of the
21 purposes of the conspiracy, then you must acquit that
22 defendant.

23 Remember that it is an unlawful agreement
24 and not an act that forms the basis of the charge
25 under this section of law. I remind you to consider

1 what I am saying in conjunction with what I have
2 already instructed you as to a conspiracy.

3 Now, does that answer your question?

4 MR. WEINBACH: May we have a side bar?

5 THE COURT: Let me get the answer first.

6 (Jurors nodding in the affirmative.)

7 THE COURT: The jury acknowledges that answer
8 to their question.

9 (Whereupon a side bar conference was had.)

10 MR. WEINBACH: I notice that the formen turned
11 to one of the other jurors, and it was some hesitation.
12 I would only ask there in connection with the answer
13 that you gave to the jury, I would ask that the
14 Government need not prove with respect to each of
15 the defendants that all three purposes were satisfied.

16 THE COURT: No, I've already told them that.
17 That's fully explanatory.

18 (Whereupon side bar conference was concluded.)

19 THE COURT: All right, recess.

20 (Whereupon jurors were excused from the
21 courtroom and continued deliberating.)

22
23 (continued next page)
24
25

CERTIFICATE OF SERVICE

Nov 2, 1977

I hereby certify that a copy of this ~~XXXX~~ ~~XXXX~~ appendix has been mailed to the United States Attorney for the Eastern District of New York.

Jonathan J. Berwain